Case Summary (English Translation)

HKSAR v 蔡永傑 (Choi Wing Kit) and Another

DCCC 985/2021 (heard together with DCCC 801/2021);
[2023] HKDC 214
(District Court)
(Full text of the reasons for sentence in Chinese at https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=150473&currpage=T)

Before: HH Judge W.K. Kwok
Date: 9 February 2023

Sentencing – NSL 23 and ss. 159A and 159C of the Crimes Ordinance (Cap. 200) - conspiracy to incite the commission by other persons of the offence of subversion – "double inchoate offence" – CA's interpretation of NSL 21 applicable to NSL 23 – stipulations in s. 159C(4) of the Crimes Ordinance – unlawful agreement already implemented as a matter of fact – culpability of offence equivalent to having committed the substantive offence – same sentence could be imposed as that for having committed the substantive offence – sentencing with reference to NSL 23 requirements – including application of sentencing tiers under NSL 23 and valid mitigating factors at common law – circumstances of the offence committed by Defendants of a serious nature – sentencing had to achieve the purposes of deterrence, retribution, denunciation and incapacitation – under 21 years of age at the time of the offence in the case of one Defendant – starting point at 5 and a half years' imprisonment for both Defendants

Background

(a) The case of DCCC 985/2021 ("Case 985")

1. The seven defendants in Case 985 pleaded guilty to one count of conspiracy to incite the commission by other persons of the offence of subversion, contrary to NSL 22 and 23 and ss. 159A and 159C of the Crimes Ordinance (Cap. 200).

2. The seven defendants were alleged to have conspired together and with others to incite others, between 10 January 2021 and 6 May 2021, to organize, plan, commit, or participate in the following acts by force or threat of force or other unlawful means with a view to subverting the State power, namely (a) overthrowing or undermining the basic system of the PRC established by the Constitution of the PRC; and (b) overthrowing the body of central power of the PRC or the body of power of the HKSAR.

3. The Court already sentenced the first, third, fourth, sixth and seventh defendants (D1, D3, D4, D6 and D7) to detention in a training centre on 8 October 2022 as they were under 21 years of age at the time of sentencing. Meanwhile, the sentencing of the second and fifth defendants (D2 Mr. Choi and D5 Mr. Chan) was adjourned until after the CA had made a decision in *HKSAR v Lui Sai Yu*. The CA subsequently handed down the judgment of the said case on 30 November 2022.

(b) The case of DCCC 801/2021 ("Case 801")

4. Case 801 involved four defendants. D4 in this case was D2 Mr. Choi in Case 985. He pleaded guilty to possessing offensive weapons or instruments fit for unlawful purposes, namely two expandable batons, with the intent to use them for any unlawful purpose, contrary to s. 17 of the Summary Offences Ordinance (Cap. 228).

5. As regards the sentences on D2 Mr. Choi and D5 Mr. Chan in Case 985 and on Mr. Choi in Case 801, the Court dealt with them together.

Major provision(s) under consideration

- NSL 23 and 33

- Crimes Ordinance (Cap. 200), ss.159A and 159C

Summary of the reasons for sentence

6. The seven defendants in Case 985 were members of a local political group called "Returning Valiant" ("the Organisation"). The Organisation was founded by D2 Mr. Choi. He and D1 were its spokespersons. Between 10 January 2021 and 6 May 2021, the seven defendants conspired together and with others in the name of the Organisation to continuously disseminate inciting messages through online social media platforms (namely two Instagram accounts and one Facebook page), speeches at street booths, distribution of leaflets, press conferences, and online live broadcasts, inciting the public to overthrow the PRC Government and the HKSARG by "armed uprising". (paras. 7-8 and 10-12)

7. The Organisation set up street booths in public places on multiple occasions advocating its subversive ideas against the State power and also held press conferences to call for an "armed uprising" to overthrow the PRC Government and the HKSARG. All the defendants participated in and assisted in the street booth activities, including giving speeches, accepting interviews from online media, distributing leaflets and holding flags printed with the logo and name of Returning Valiant. The content of the leaflets included statements such as "revolution is an insurrection, a violent action of one class overthrowing another", "how can we talk about revolution if the people's wisdom is not enlightened?", "the closing of every revolution is accompanied by dead bodies everywhere" and "liberating our city is our mission". (paras. 15, 18 and 45)

(a) ***The penalty regime under NSL 23***

8. NSL 23 stipulated that concerning a person who incited the commission by other persons of the offence of subversion under NSL 22, if the circumstances of the offence committed by such person were of a serious nature, the person should be sentenced to fixed-term imprisonment of not less than five years but not more than ten years; if

the circumstances of the offence committed by such person were of a minor nature, the person should be sentenced to fixed-term imprisonment of not more than five years, short-term detention or restriction. Therefore, the range of penalties stipulated under NSL 23 could be divided into two tiers:

(a) The upper tier: When the circumstances of the offence were considered to be of a "serious nature", the only option of sentence was "imprisonment", with a term of not less than five years;
(b) The lower tier: When the circumstances of the offence were considered to be of a "minor nature", the sentencing options are diverse, with no mandatory minimum term of imprisonment. (paras. 71-73)

9. Furthermore, NSL 33 stipulated the three scenarios where "a lighter penalty may be imposed, or the penalty may be reduced" or, in the case of a minor offence, even "exempted". (para. 74)

10. The Court stated that the CA's decision in *Lui Sai Yu* [2022] HKCA 1780 provided indicative guidance for the sentencing of the two Defendants. In that case, the CA held that:

(a) When the circumstances of the offence were considered as serious (such that the upper tier of punishment would apply), the minimum term of five years' imprisonment as stipulated by NSL 21 was mandatory. In other words, the term of imprisonment could not be less than five years.
(b) The first paragraph of NSL 33 set out three conditions for "imposing a lighter penalty" (i.e. imposing a lighter penalty within the applicable penalty tier), "reducing the penalty" (i.e. reducing the penalty from the applicable tier to a lower tier) and "exempting the penalty" (i.e. exempting from punishment).
(c) The three conditions listed in the first paragraph of NSL 33 were exhaustive. In other words, the Court could only "reduce the penalty" when one or more of the three listed conditions were met, and other mitigating factors recognised under local

laws (including pleading guilty) did not apply.

(d) On the other hand, within each tier of sentencing, other mitigating factors recognised under common law but not stipulated in the first paragraph of NSL 33 (such as pleading guilty) could still operate in full. (paras. 75-77)

11. Although *Lui Sai Yu* concerned incitement to secession contrary to NSL 20 and 21, while this case concerned incitement to subversion contrary to NSL 22 and 23, the penalty provisions in NSL 21 and 23 were the same. The Court held that the interpretation of NSL 21 in *Lui Sai Yu* was applicable to NSL 23. (paras. 75 and 78)

(b) Sentencing for conspiracy to commit an offence under NSL 23

12. The Defence submitted that in the absence of a conspiracy offence under NSL 23, even if the substantive offence of the defendants' conspiracy was formulated under the NSL, the substantive offence charged against the defendants was brought under the Crimes Ordinance. The Defence argued that in this situation of a "double inchoate offence", the "two-tier penalty regime" under the NSL could not be automatically converted in full into the penalty regime for conspiracy under the Crimes Ordinance. (para. 79)

13. The Court agreed that the two Defendants, namely D2 Mr. Choi and D5 Mr. Chan, were not convicted of the offence under NSL 23 but rather the offence of conspiracy under the Crimes Ordinance. Therefore, the penalty regime under NSL 23 was not directly or mandatorily applicable. According to s. 159C(4) of the Crimes Ordinance, the Court could not impose a sentence higher than the maximum sentence for the offence. While this was mandatory, there was no prescribed minimum sentence. In other words, subject to the maximum term of imprisonment for the relevant offence, the Court had the discretion to impose any appropriate sentence. (para. 80)

14. The Court held that when exercising this discretion, the Court was not obliged to impose a lower sentence on a defendant found guilty of conspiracy than the sentence for the substantive offence of the relevant

charge. As long as the facts reflected that the Defendant had committed the substantive offence of the relevant charge, even if he was only charged with and convicted of conspiracy, the Court, in exercising its sentencing discretion, could still impose the same sentence as he would have received for having committed the substantive offence. In general, the Court should exercise its discretion in this way because the ultimate goal of sentencing was to impose an appropriate sentence on a defendant based on the true seriousness of the crime. (para. 81)

15. According to the facts admitted by the two Defendants based on which they were convicted, the unlawful agreement in question had already been implemented as a matter of fact. Between 10 January 2021 and early May when the two of them were arrested, they continuously executed the unlawful agreement to incite others to commit the offence of subversion. Every post published by them in the name of Returning Valiant, every speech made at the street booths, every leaflet they distributed, and the inciting messages disseminated in every press conference and online live broadcast, advocating “armed uprising” by the public to overthrow the PRC Government and the HKSARG, each constituted a separate substantive offence, namely inciting others to commit the offence of subversion, contrary to NSL 22 and 23. (para. 82)

16. Even though the Court had the discretion in sentencing, since the two Defendants had already implemented their conspiracy with others, the gravity of their offence was equivalent to their actually committing the substantive offence. Thus, the appropriate sentence should be equivalent to the sentence they would have received for contravening NSL 23. (para. 82)

(c) Whether the circumstances of the offence in Case 985 were of a “serious nature”

17. The Court stated that the CA’s decisions in *HKSAR v Ma Chun Man* [2022] HKCA 1151 and *Lui Sai Yu* provided guidance on the approach and the necessary considerations in determining whether the circumstances of the offence were of a serious nature. The Court considered that the circumstances of the offence in Case 985 as a whole

were of a “serious nature”: (paras. 83 and 84)

(a) Although D2 Mr. Choi, D5 Mr. Chan and other defendants were charged with one count of conspiracy, the gravity of the circumstances of this case was not limited to the stage where they had only reached an unlawful agreement not yet acted upon. The defendants had actually acted according to this unlawful agreement, and the seriousness of the case laid in the fact that they had individually and as an enterprise committed on multiple occasions acts of incitement to subversion. (para. 85)

(b) From the inciting speeches made by D2 Mr. Choi, D5 Mr. Chan and other defendants in the name of Returning Valiant, it could be seen that the “armed uprising” advocated by them meant bloodshed revolution, and that moreover they maintained a continuous bloodshed revolution until success. Although there was no direct evidence that others had actually been successfully incited by them, their speeches might succeed in inciting some immature people, and convince those who originally advocated “peace, rationality and non-violence” to agree with their views. Insofar as a small group of people or even just a single person was incited by them, the stability of the Hong Kong society and the safety of the people could be seriously endangered. No city in pursuit of peace and stability in lives would possibly allow armed revolutions of any scale or even in a lone-wolf style. The mere fact that they advocated for a boundless bloodshed revolution to overthrow the existing ruling regime rendered the circumstances of this case serious. (para. 86)

(c) As asserted by the Defence, the defendants had explained in their speeches at street booths and on social platforms that it was not yet the time for revolution because the people were not yet enlightened, and they would work on enlightening the people. The Court held that the defendants were explicitly saying that their inciting behaviour would persist. This aggravated the seriousness of the facts of the case. (para. 87)

(d) Although the defendants did not ask their incited targets to resort to immediate violence, they encouraged like-minded people to equip themselves by learning and practising martial arts (such as regular physical training, boxing, judo, self-defence, etc.), and asked them to use the same in appropriate time. The Court held that in essence, they suggested and encouraged like-minded people to take immediate action to prepare for armed revolution, and enhance their ability to use violence through learning and practising martial arts, so that the impending so-called armed revolution could be bloodier and more long-lasting. (para. 88)

(e) Such inciting behaviour could turn an otherwise peaceful person into someone who knew no bounds to the use of violence in a short space of time. Any incitement had a chance of success. Those incited might be people with no prior history of using violence or other means to endanger the personal safety of others, which made them even more insidious before the actual action and thus unpreventable. (para. 89)

(f) The defendants had long-term plans for their actions; they were not without implementation plans. For instance, they proposed to provide living support to the "comrades" who had been sentenced for the anti-extradition law amendment incident and faced livelihood difficulties after release, so that they could participate in resistance again. (para. 90)

(g) The behaviour of the defendants was perpetrated under a social atmosphere of continuous unrest or at the very least in a state of instability. At the material times, certain people or even a large portion of the population still rejected the constitutional order after the reunification and took action to resist. (para. 91)

(h) The defendants chose locations with high pedestrian traffic to set up street booths for a wider outreach. Their speeches were also broadcast online through the media. Their culpability lay in making use of the busy locations to carry out the incitement with the intention of promoting their idea of armed revolution as

widely as possible. (para. 93)

(i) The postings published by the Organisation on social platforms were not substantial in quantity and scale, but still of some volume and on a continuous basis. Using social platforms for incitement was an aggravating factor for sentencing. (para. 94)

(j) The Defence emphasised that this case did not involve the sale or purchase of any weapons. The Court stated that the defendants' plan was not an immediate armed revolution, and therefore there was no need to sell or purchase weapons at that stage. However, one of the posts showed that the person posting it intended to launch a "true armed revolution with live ammunition". (para. 95)

(k) The defendants, knowing that the NSL had come into force, still established "Returning Valiant" to challenge the law and the State power of the PRC Government over Hong Kong. This aggravated the seriousness of the circumstances of the case. The Court found it incredulous that the defendants, when advocating for a bloodshed revolution, were unaware that their actions would be in breach of the NSL, or would carry such risk. The police officers had also warned them of the possibility of breaching that Law. (para. 96)

(l) The Court agreed that there was no evidence directly proving that anyone had committed subversive acts as a result of the defendants' incitement, but this risk actually existed. Insofar as some people or even a single person carried out a boundless armed revolution as a result of the incitement, great harm would or might be caused to society. (para. 97)

(d) Culpability of the two defendants D2 Mr. Choi and D5 Mr. Chan in Case 985

18. The Court previously assessed the culpability of the other five defendants in Case 985 (namely D1、D3、D4、D6 and D7) to be in the "minor" category based on their age, immaturity and susceptibility to

instigation, and accordingly sentenced them to detention in a training centre. (para. 100)

19. D2 Mr. Choi was under 21 years of age when he committed the offence. Although his culpability could thus be adjusted downward, the Court held that the circumstances of his offence were still of a "serious nature" under NSL 23, having regard to the overall culpability of the relevant offence and his participation: (paras. 101 and 102)

(a) Among all the defendants, except D5 Mr. Chan, D2 Mr. Choi was older than the other defendants. He was also the one closest to the adult age of 21 and the founder of the Organisation. Therefore, the only reasonable and irresistible inference was that the theory or idea of a boundless bloodshed revolution put forward by the Organisation came from D2 Mr. Choi.
(b) He was the person inciting the other defendants to form this conspiracy enterprise.
(c) The Organisation incited others to carry out a boundless bloodshed revolution. This single factor alone was sufficient to characterise the nature of the circumstances of the offence as serious or even quite serious.
(d) D2 actively participated in the Organisation. Apart from being the founder, he controlled the two Instagram accounts and the Facebook account of the Organisation, capable of disseminating the Organisation's inciting ideas to an unlimited number of people. He had also personally gave speeches at the street booths, acted as a spokesperson for media interviews, etc.

20. As for D5 Mr. Chan, the Court held that the circumstances of his offence were of a serious nature under NSL 23: (para. 103)

(a) He was over 24 years old at the time of the offence and a mature adult.
(b) The Court found it incredulous that he joined the Organisation upon instigation.
(c) He did not speak at the street booths, but he did distribute the inciting leaflets.

(d) He acted as an English interpreter at the press conference attempting to promote the Organisation's ideas to the international community.

(e) Sentencing of Mr. Choi and Mr. Chan

21. Since D2 Mr. Choi and D5 Mr. Chan in Case 985 had already carried out their unlawful agreement with others, the Court held that their sentences were no different from that for having committed the substantive offence under NSL 23. This included the applicable sentencing tier under NSL 23 and the valid mitigating factors at common law. (para. 104)

22. The Court held that sentencing had to achieve the purposes of deterrence, retribution, denunciation and incapacitation. As the theory or idea of a boundless bloodshed revolution definitely could never be allowed to appear and spread in this society, if Mr. Choi had reached the age of 21 when he committed the offence of conspiracy to incite the commission by other persons of the offence of subversion, the Court would have certainly adopted 6 years' imprisonment as the starting point for sentencing. However, he was under 21 years of age at the time of the offence, so the Court reduced the starting point of his sentence by 6 months to 5and a half years' imprisonment. (paras. 105 and 106)

23. As for Mr. Chan, he was neither the founder nor spokesperson of the Organisation. Except for acting as an English interpreter at the press conferences, he did not speak in person at the street booths. However, he had distributed the leaflets in question at the street booths on as many as three occasions. The Court adopted 5and a half years' imprisonment as the starting point for his sentence. (para. 107)

24. Both Mr. Choi and Mr. Chan pleaded guilty and raised other mitigating factors, but when exercising discretion in sentencing, the Court needed to refer to the requirements under NSL 23. Therefore, the Court would only reduce their sentences each by 6 months to reflect its consideration of all mitigating factors available at common law so that the final sentences would not be less than 5years' imprisonment. In other

words, in Case 985, the Court sentenced the two of them to 5 years' imprisonment. (para. 108)

25. As regards the offence of possession of offensive weapons or instruments fit for unlawful purposes to which Mr. Choi pleaded guilty in Case 801, the Court adopted 9 months' imprisonment as the starting point for sentencing. He could receive a one-third reduction for his guilty plea, resulting in a sentence of 6 months' imprisonment. (para. 110)

26. The offences in the two cases were not connected, so their sentences could run consecutively in full. But taking into account the totality in sentencing and to avoid imposing an unduly lengthy overall sentence, the Court ordered that 3 months of the sentence in Case 801 to run concurrently with the sentence in Case 985, and the remaining 3 months to run consecutively. In other words, Mr. Choi's overall sentence was 5 years and 3 months' imprisonment. (paras. 111 and 112)

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